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IN THE

SUPREME COURT OF THE UNITED STATES

No. 71-129

ILLINOIS STATE TRUST COMPANY, a Corporation, Guardian of the Estate of DANIEL DAVID LAND, a Minor, and ARTHUR LAND,
Petitioners,

vs.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
a Corporation,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION

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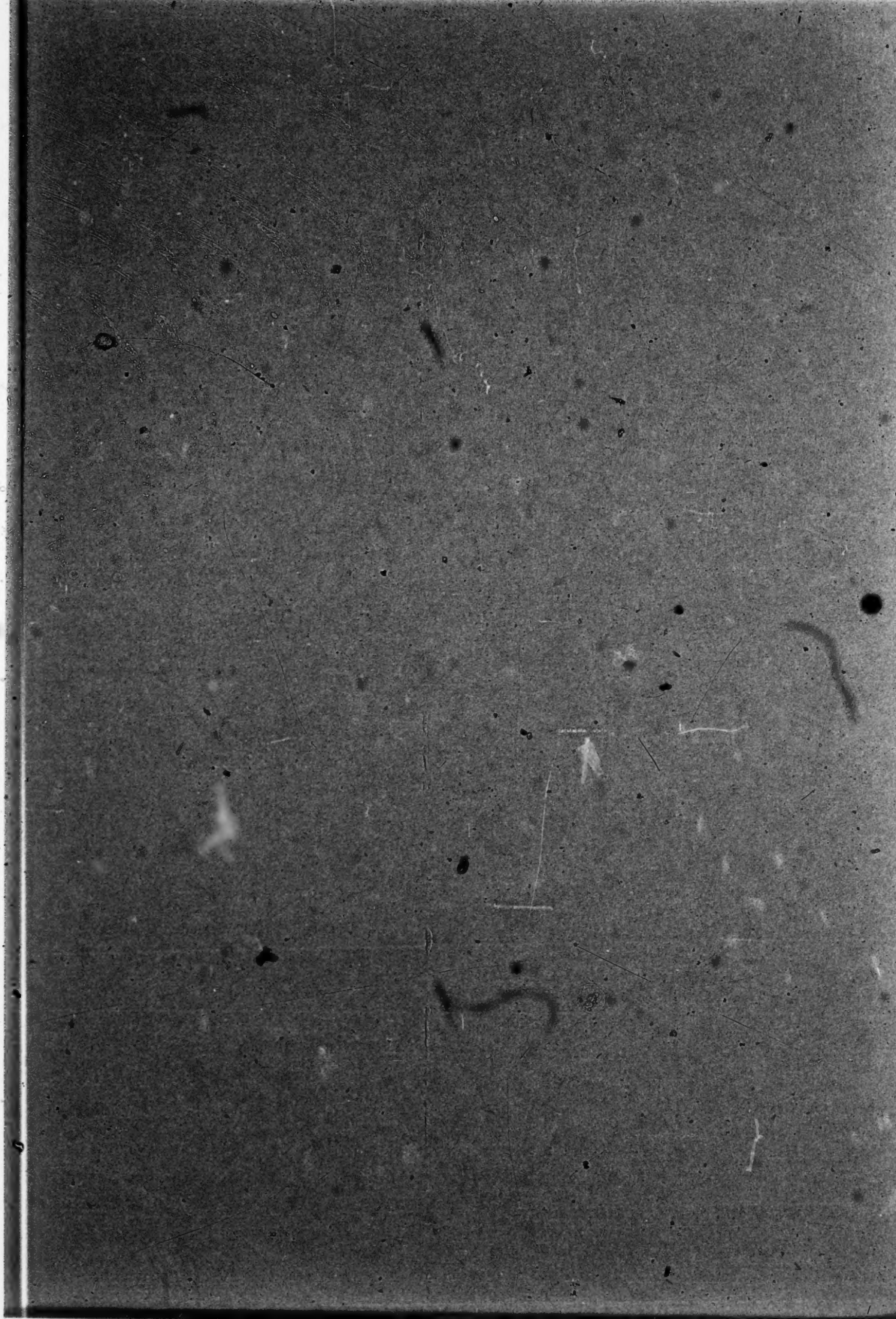

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OPINION BELOW

Illinois State Trust Co., etc. v. Terminal Railroad Association of St. Louis, 440 F. 2d 497 (1971) Advance Sheet June 14, 1971.

QUESTIONS PRESENTED FOR REVIEW

1. Did the District Court err in denying plaintiff's motion to remand the cause to the State Court from which it was removed?

2. Did the District Court err in granting defendant's motion for a directed verdict?

STATEMENT OF THE CASE

The statement of facts in the opinion written by Chief Judge Swygert is succinct and concise (Appendix 7a of the Petition for Writ of Certiorari).

Counsel for petitioner has inferred, contrary to the evidence that the engineer saw David Land and Jimmy Bell at the crossing or hopping this train at the crossing. Curtis White, the engineer, saw a boy and a dog approximately 25 car lengths after the engine had passed across the crossing when he looked back for hotboxes as the engine moved into a curve (R. 154-55).

David Land had never been to this crossing before and Jimmy Bell did not tell him why he was taking him down there (R. 78).

REASONS FOR DENYING THE WRIT

1. The ruling of the 7th Circuit Court of Appeals on the question of removal was proper under the facts and prior decisions of the 7th Circuit Court of Appeals cited in the opinion. The decision is in conformity with other Circuit Courts of Appeals. **Kelly v. U. S. Steel Corp.**, 284 F. 2d 850 (3rd CCA); **Egan v. American Airlines, Inc.**, 324 F. 2d 565 (2nd CCA). There is a lucidating opinion of Chief Judge Robinson in the case of **Mahoney v. Northwestern Bell Telephone Co.**, 258 F. Supp. 500.

2. Chief Judge Swygert properly interpreted and applied the applicable law of Illinois.

Plaintiff's counsel relies upon the case of **Kahn v. James Burton Co.**, 5 Ill. 2d 614, 126 N.E. 2d 836 (1955) which is the only case of the Supreme Court of the State of Illinois cited by him. The Supreme Court of Illinois, at page 624, lays down the applicable Illinois rule wherein it is stated:

"It is generally true, as defendant contends, that an owner or one in possession and control of premises is under no duty to keep them in any particular state or condition to promote the safety of trespassers or others who come upon them without any invitation, either express or implied. **(Briney v. Illinois Central Railroad Co.**, 401 Ill. 181; **Darsch v. Brown**, 332 Ill. 592.) It is also established that infants, as a general rule, have no greater rights to go upon the land of others than adults, and that their minority of itself imposes no duty upon the occupier of land to expect them or prepare for their safety. **(Burns v. City of Chicago**, 338 Ill. 89; **McDermott v. Burke**, 256 Ill. 401.) It is recognized, however, that an exception exists where the owner or person in possession knows, or should know, that young children habitually frequent the vicinity of a **defective structure or dangerous agency** existing on the land, which is likely to cause injury to them because they, by reason of their immaturity, are incapable of appreciating the risk to the children. In such cases there is a duty upon the owner or other person in possession and control of the premises to exercise due care to remedy the condition or otherwise protect the children from injury resulting from it." (Emphasis supplied.)

It is to be observed that the Supreme Court cited the case of **Briney v. Illinois Central**, 401 Ill. 181 which is a case with stronger facts for the plaintiff than the instant suit and liability was not found.

The Supreme Court of Illinois in the case of **Driscoll v. C. Rasmussen Corp.**, 35 Ill. 2d 74, 219 N.E. 2d 483 **(1966)** held that there was not a submissible case when a boy living in a house across the alley went upon the premises where there was a construction trash pile and was burnt

when he ignited a paint can. In the case of **Landman v. M. Susan & Associates, Inc.**, 63 Ill. App. 2d 292, 211 N.E. 2d 407 **(1965)**, the Court affirmed a directed verdict for defendants brought on behalf of a 12 year old boy to recover for injuries resulting from sand thrown by another minor playmate while playing on a sand pile of the construction site maintained and controlled by defendant. The Court found that the injury to the minor was not the result of any hazard or danger inherent in the pile of sand or substance or its location. In the case of **Sydenstricker v. Chicago & N.W. Ry. Co.**, 107 Ill. App. 2d 427, 247 N.E. 2d 15, 18 **(1969)** it was held that a child injured while playing on defendant's railroad car on defendant's property was not entitled to have his case submitted to a jury. Similarly the rules laid down in the Kahn case were held inapplicable to injuries to a child who fell through a skylight while playing on the roof of defendant's apartment. **Colon v. Marzec**, 115 Ill. App. 2d 410, 253 N.E. 2d 669, 672 **(1969)**. A concise interpretation of the **Kahn** case and others cited by counsel for petitioner is set forth in the opinion of the **Colon** case (L.C. 672):

> "Plaintiff, in his brief, cites to us the **Kahn** case and a number of our recent decisions. Kahn v. James Burton Co., 5 Ill. 2d 614, 126 N.E. 2d 836; Halloran v. Belt Ry. Co., 25 Ill. App. 2d 114, 166 N.E. 98; Skaggs v. Junis, 27 Ill. App. 2d 251, 169 N.E. 2d 684; Smith v. Springman Lumber Co., 41 Ill. App. 2d 403, 191 N.E. 2d 256; Stewart v. DuPlessis, 42 Ill. App. 2d 192, 191 N.E. 2d 622; American Nat. Bank & Trust Co. v. Penn. R. Co., 52 Ill. App. 2d 406, 202 N.E. 2d 529; Dallas v. Granite City Steel Co., 64 Ill. App. 2d 409, 211 N.E. 2d 907. It is enough to say that through these cases run a comman thread; in each, the owner or possessor of premises known to be frequented by small children negligently maintained a **hazardous** or

> **dangerous condition**; and the burden of eliminating the **hazard or danger was slight compared with the risk to the children involved.** This common thread distinguishes those cases from the one before us." (Emphasis supplied.)

The applicable law of Illinois for verdict directing is stated in **Pedrick v. Peoria & Eastern R.R. Co.**, 37 Ill. 2d 494, 229 N.E. 2d 504, the Court stated (L.C. 510):

> ". . . But the presence of some evidence of a fact which, when viewed alone may seem substantial, does not always, when viewed in the context of all the evidence retain such significance. As the light from a lighted candle in a dark room seems substantial but disappears when the lights are turned on, so may weak evidence fade when the proof is viewed as a whole. Constitutional guarantees are not impaired by direction of a verdict despite the presence of some slight evidence to the contrary . . . for the right to a jury trial includes the right to a jury verdict only if there are factual disputes of some substance."

Neither boy saw any member of the crew on the engine or caboose. David had never been at the crossing to ask for flares and his friend, Jimmy, did not tell David where he was taking him. If David and Jimmy were on any mission after they arrived at the crossing, it had not started when David attempted to hop the train. There was no evidence to show that David had any knowledge of the habits of other boys with respect to asking for flares or that he was at the intersection of the tracks and Cargill Road as a result of any implied invitation from the defendant. There was no evidence to show that the boys were in the habit of hopping trains or that the defendant had any knowledge of or any reason to believe that boys were hopping trains.

CONCLUSION

The Federal question was properly decided under applicable decisions. The State question likewise was decided properly under the State law. Therefore there are no special or important reasons under Rule 19(b) of this Court to assert jurisdiction and the petition should be denied.

Respectfully submitted

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